BANK KERJASAMA RAKYAT MALAYSIA BHD

v.

NESARETNAM SAMYVELOO

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[ORIGINATING SUMMONS NO: 24-809-2001]
31 OCTOBER 2002

LAND LAW: *Charge - Order for sale - Form 16D adverting to 7-day breach period - Whether in breach of statutory one month period - Whether parties could contract for shorter period - National Land Code, ss. 254, 254(1)(b), 256(3)*

The court in this case had dismissed the plaintiff's application for an order for sale, on the ground that the plaintiff, by issuing a Form 16D that alluded to a 7-day breach by the chargor, had contravened s. 254 National Land Code ('NLC') which prescribed a breach period of 30 days. In deciding thus, the court was apparently persuaded by the High Court decision in *Mohamad Khalid Farzalur Rahaman & Anor v. Citibank Berhad & Anor* which ruled that the parties had no right to shorten the period from 30 days to anything less, not realizing that that decision, on appeal, had been overruled by the Court of Appeal. In the obtaining situation, a question has thus arisen as to whether the court ought to abide by the principle of *stare decisis* and correct its flawed decision aforesaid.

Held:

[1] This court was in error in holding that Form 16D was irregular and in dismissing the plaintiff's application. It is much regretted that the court, as did counsel for the parties, were not then aware of the Court of Appeal decision in *Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors* which decided that s. 254 of NLC, by its clear words, had expressly permitted a chargor by contract to accept a statutory notice of less than one month. In the circumstances, the dismissal of the plaintiff's action cannot be upheld. (p 99 d-e)

[Order accordingly.]

Case(s) referred to:
Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(foll)***
OCBC Bank (M) Bhd v. Gunasegaran Arunasalam [2000] 6 MLJ 859 ***(not foll)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Mohamad Khalid Farzalur Rahaman & Anor v. Citibank Bhd & Anor [2000] 2 CLJ 797 HC ***(not foll)***

Legislation referred to:
National Land Code, ss. 254(1)(b), 256(3), 340
Rules of the High Court 1980, O. 83

For the plaintiff - Kiranjit Kaur; M/s Mustafa, Ling & Co
For the defendant - En Jayaprathap; M/s Jayaprathap & Partners

Reported by WA Sharif

JUDGMENT

Balia Yusof JC:

The plaintiff in this case is a bank while the defendant is the owner of a piece of land known as H.S. (D) DGS 475/84 Lot No. 026538 in the District of Manjung, Sitiawan (hereafter referred to as "the said land"). On 8 May 2000 the plaintiff approved a loan facility under the concept of Al-Bai Bithamin Ajil in favour of the defendant for a sum of RM55,000 *vide* exh. HM3 in encl. 2 (hereafter referred to as "the said facility"). In consideration of the said facility granted, the defendant charged the said land to the plaintiff bank *vide* Presentation No. 18682/2000 Vol 2A Folio 15 which is being exhibited in encl. 2 as HM1 (hereafter "the said charge").

When the defendant defaulted payment, the plaintiff caused to issue a notice of default in Form 16D dated 15 Mac 2001 (exh. HM4 of encl. 2, hereafter referred as "Form 16D") to the defendant pursuant to s. 254(1) of the National Land Code (hereafter referred to as 'NLC'). It was stated in the Form 16D that the defendant was required to remedy the breach within 14 days failing which plaintiff would proceed to apply for an order for sale in court. Upon the defendant's failure, the plaintiff filed this foreclosure action.

At the hearing of the action in encl. 1, the defendant's counsel raised an objection contending that the content in Form 16D is defective in that the period of seven days as stipulated in the said Form 16D is in contravention of the statutory period as provided for in s. 254 NLC. It was contended on behalf of the defendant that s. 254 NLC provides for a period of at least one month in respect of the breach by the chargor of the said property and that the Form

16D stated the duration of the breach as seven days and at the same time gave only a period of 14 days for the defendant to remedy the breach. Section 254 NLC stipulates that:

> 254(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D:
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> (a) specifying the breach in question;
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> (b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
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> (c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.
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> (2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.
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> (3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:
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> (a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and
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> (b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:
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> Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

In dealing with a foreclosure action under s. 256 of NLC, the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 laid down the principle that "A judge hearing an application under s. 256 of the Code must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question "whether the material produced before him by the chargor constitutes cause to the contrary." The Federal Court went on to explain the meaning of "cause to the contrary" in s. 256(3) NLC by saying that" 'cause to the contrary' within s. 256(3) of the Code might be established only in three

categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale."

In objecting to the said application, learned counsel for the defendant relied on the case of *Mohamad Khalid b. Farzalur Rahaman & Anor v. Citibank Bhd & Anor* [2000] 2 CLJ 797 wherein it was held that:

> In looking into the reason why Parliament had specifically stated that the period of default ought to be at least one month, it is logical to conclude that the longer the time that is given to the chargor, the better is his opportunity to protect his property from foreclosure. It did not make sense therefore to hold that, whilst parties were free to contract to include a period other than one month as stated in s. 254(1), it ought to mean that the chargee could stipulate a period of time shorter than one month. Applying the golden rule of interpretation of statutes, the period of breach referred to in s. 254(1) of the NLC should be at least one month. This is because when s. 254(1) of the NLC stipulated that the period of breach ought to have been continued for a period of at least one month, the alternative period that may be specified in the charge by the chargee bank must be a period greater than one month, otherwise Parliament would have specifically stated it.

Justice RK Nathan held that the parties had no right to shorten the period from 30 days to anything less than what is provided for in s. 254 and the order for sale obtained by the bank was declared to be null and void. The same principle was followed in the case of *OCBC Bank (M) Bhd v. Gunasegaran a/l Arunasalam* [2000] 6 MLJ 859. The defendant's counsel submitted they have shown cause to the contrary under s. 256(3) of NLC and as such plaintiff's action ought to be dismissed.

In reply, counsel for the plaintiff submitted that s. 254(1)(b) NLC does allow an alternative period as may be specified in the charge and cl. 14 of the said charge clearly provides for a period of seven days. The parties have contracted on this and are therefore bound by it. No authorities were submitted to support her contention.

Having considered the argument of both counsels and the authorities cited and further guided by the principles enunciated in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)*, I accordingly dismissed the plaintiff's action with cost. In dismissing the plaintiff's action, I was very much persuaded by the authority cited by the learned counsel for the defendant in the case of *Mohamad Khalid*

b. Farzalur Rahaman & Anor v. Citibank Bhd. & Anor (supra) which was followed in the case of *OCBC Bank (M) Bhd v. Gunasegaran a/l Arunasalam (supra)*. Little did I realise and neither counsel for both sides draw to my attention that the case of *Mohamad Khalid b. Farzalur Rahaman & Anor v. Citibank Bhd. & Anor* was overruled by the Court of Appeal in *Citibank Bhd v. Mohamad Khalid b. Farzalur Rahaman & Ors* [2000] 3 CLJ 739. The Court of Appeal held that the judge's interpretation of s. 254(1) of the National Land Code was wrong and at p. 749, Gopal Sri Ram JCA said:

> So when Parliament enacted s. 254(1) of the Code and employed therein the words 'or such alternative period as may be specified in the charge', it clearly intended by that phrase to alter the law by enabling a chargee to impose a period of less than a month. The Code in s. 254 therefore expressly permits a chargor by contract to accept a statutory notice of less than one month.

Such being the case, and based on the principle of *stare decisis* I was clearly in error in holding that Form 16D is irregular and dismissing the plaintiff's application. It is much regretted that this court was not aware of the decision of the Court of Appeal much earlier and counsel for both parties too, in my belief, were not aware of the same. As in the case of *Mohamad Khalid b. Farzalur Rahaman & Anor v. Citibank Bhd. & Anor and OCBC Bank (M) Bhd v. Gunasegaran a/l Arunasalam*, my decision relies on the more restrictive interpretation of s. 254 of the NLC which has been ruled by the Court of Appeal to be erroneous. In the circumstances, the dismissal of the plaintiff's action cannot be upheld.